No. 89-1041

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MISSISSIPPI
and
MISSISSIPPI PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SYSTEM ENERGY RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals properly concluded that the Federal Energy Regulatory Commission's decision to order the four retail electric companies of the highly integrated Middle South Electric System to share the investment costs of all four nuclear generating units within the System is supported by substantial evidence and has been explained adequately.

STATEMENT REQUIRED BY RULE 29.1

System Energy Resources, Inc. (formerly Middle South Energy, Inc.) is a wholly-owned subsidiary of Entergy Corporation (formerly Middle South Utilities, Inc.), a public utility holding company registered with the Securities and Exchange Commission pursuant to the Public Utility Holding Company Act of 1935.

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BRIEF OF RESPONDENT SYSTEM ENERGY RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

System Energy Resources, Inc., an applicant in proceedings below before the Federal Energy Regulatory Commission and intervenor in support of the respondent in the case before the United States Court of Appeals for the District of Columbia Circuit, sub-

mits this Brief In Opposition to the petition for a writ of certiorari.[1]

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Mississippi Industries v. Federal Energy Regulatory Comm'n* ("*Mississippi Industries*"), decided January 6, 1987, is reported at 808 F.2d 1525 and reprinted in the Appendix to the Petition ("App.") at pages 46a–137a.[2] The Opinion of the United States Court of Appeals for the District of Columbia Circuit in *City of New Orleans v. Federal Energy Regulatory Comm'n* ("*City of New Orleans*"), decided May 26, 1989, is reported at 875 F.2d 903 and reprinted in the Appendix to the Petition at 5a–10a.

Also at issue in this proceeding are four underlying opinions of the Federal Energy Regulatory Commission.[3] These opinions were in turn based on findings

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[1] The views expressed herein are supported by respondents Louisiana Power & Light Company, Mississippi Power & Light Company, Arkansas Power & Light Company and New Orleans Public Service Inc.

[2] Where possible, this Brief shall make reference to the Appendix to the Petition.

[3] *Middle South Energy, Inc.*, Opinion No. 234, 31 F.E.R.C. (CCH) ¶ 61,305 (1985); *Middle South Energy, Inc.*, Opinion No. 234-A, 32 F.E.R.C. (CCH) ¶ 61,425 (1985) (opinion on rehearing); *System Energy Resources, Inc.*, Opinion No. 292, 41 F.E.R.C. (CCH) ¶ 61,238 (1987) (opinion and order on remand) (App. 11a–38a); *System Energy Resources, Inc.*, Opinion No. 292-A, 42 F.E.R.C. (CCH) ¶ 61,091 (1988) (opinion on rehearing) (App. 39a–45a).

of fact set out in two administrative law judge initial decisions.[4]

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in the Petition at 3.

STATUTES INVOLVED

Sections 205(a) and (b) and 206(a) of the Federal Power Act, 16 U.S.C. §§ 824d(a)–(b), 824e(a), are set forth in the Petition at 3–4. In addition, Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), states in pertinent part:

> The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

STATEMENT OF THE CASE

Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L") and New Orleans Public Service Inc. ("NOPSI") (collectively, "System operating companies") are affiliated electric utility operating companies owned entirely by Entergy Corporation (formerly Middle South Utilities, Inc. ("MSU")), a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79–79z-6 ("PUHCA"). Collectively, the System operating companies and System Energy Re-

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[4] *Middle South Energy, Inc.*, 26 F.E.R.C. (CCH) ¶ 63,044 (1984); *Middle South Services, Inc.*, 30 F.E.R.C. (CCH) ¶ 63,030 (1985).

sources, Inc. ("SERI") form a highly integrated network for the transmission and sale of electricity in interstate commerce (the "Middle South Electric System" or "System"). Within this network, which is interconnected by an interstate system of extra-high voltage transmission facilities, the System operating companies provide electric service (from generating units owned by them and SERI) in the states of Arkansas, Louisiana, Mississippi and Missouri, where their retail rates are regulated by five different state or local regulatory authorities. (*See* App. at 49a).

Since 1951, the construction of new generating facilities by the System operating companies, and the interstate sale for resale of electric capacity and energy among them, has been coordinated in a series of power pooling agreements. Each such agreement was called the "System Agreement" and filed with either the Federal Power Commission or the Federal Energy Regulatory Commission ("Commission" or "FERC"), as required by the Federal Power Act, 16 U.S.C. §§ 791a–825r. (App. at 50a–51a).[5]

SERI was formed in 1974 to finance, construct and operate the Grand Gulf Nuclear Electric Station, planned as a two-unit nuclear fueled generating sta-

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[5] The original System Agreement was filed at the Federal Power Commission in 1951. A significantly revised System Agreement was filed and made effective in 1973, and various other more limited revisions were made from time to time. (App. at 50a). Prior to the filing of the System Agreement at issue in this case, the preceding System Agreement was approved by the FERC in *Middle South Services, Inc.*, 16 F.E.R.C. (CCH) ¶ 61,101 (1981), *aff'd sub nom. Louisiana Public Service Comm'n v. Federal Energy Regulatory Comm'n*, 688 F.2d 357 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

tion near Port Gibson, Mississippi to meet the projected needs of the System operating companies. (App. at 57a–60a). All of the power available to SERI from Grand Gulf Unit No. 1 ("Grand Gulf 1"),[6] which is involved in this case, was to be sold to the System operating companies as sales for resale in interstate commerce under rates approved by the Commission. All four System operating companies together with MSU (now Entergy Corporation), their parent company, jointly participated in the decisions to initiate construction of Grand Gulf 1, to continue and complete the construction, and to allocate the output of the unit. (App. at 58a). As required by Sections 11(b) and 2(a)(29) of the PUHCA, 15 U.S.C. §§ 79k(b), 79b(a)(29), the four System operating companies and SERI are integrated electrically so that they can be "operated as a single interconnected and coordinated system" serving a single geographic region.

Strategically located in different regions of the System are a number of generating facilities, either fossil or nuclear fueled. There are four nuclear generating units included in the System's mix of generating resources: Grand Gulf 1; Arkansas Nuclear One Units 1 and 2 ("ANO 1 and 2"), located in Arkansas and owned and operated by AP&L; and the Waterford Steam Electric Generating Station Unit 3 (Nuclear) ("Waterford 3"), located in Louisiana and operated by LP&L.[7] Contrary to the repeated assertion of Petitioners, all of these units were planned to meet,

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[6] SERI owns or leases ninety percent of Grand Gulf 1. A rural electric power association, not involved in this case, owns the remaining ten percent. Grand Gulf Unit No. 2 was cancelled in 1989.

[7] LP&L owns or leases all of Waterford 3.

and do meet, overall System needs. *See, e.g.*, App. at 107a.

The generating facilities owned by the System operating companies and SERI, including the four nuclear units, are centrally dispatched from Pine Bluff, Arkansas, without regard to ownership, to obtain the lowest reasonable cost of energy to each of the System operating companies consistent with certain operational and reliability considerations. The System Agreement specifies the manner in which the capacity and energy from these facilities and their associated costs will be shared at the wholesale level among the System operating companies.[8] (App. at 52a).

In 1982, a newly revised System Agreement and a Unit Power Sales Agreement ("UPSA") for the sale of capacity and energy from Grand Gulf 1, the two specific agreements involved in this case, were filed at the Commission. The revised System Agreement modified the manner in which the System operating companies share the costs of generating capacity owned directly by them. (App. at 60a). It anticipated the filing and introduction of the UPSA into the overall contractual arrangements coordinating wholesale power sales within the Middle South Electric System.

Under the UPSA, to which each System operating company is a party, SERI agreed to sell power from Grand Gulf 1 to the System operating companies. Pursuant to its provisions, shares of power applicable to each of the System operating companies were spec-

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[8] "Capacity" is the amount of electricity available from a generating unit or facility at a given point in time, measured in kilowatts. "Energy" is the amount of electricity delivered over time, measured in kilowatt-hours.

ified in accordance with an earlier agreement among them. The entitlement or allocation shares (expressed as percentages), in conjunction with various cost of service provisions, determined the amount that each System operating company would pay for the power. Thus, the entitlement percentages together with the cost of service provisions constitute SERI's wholesale rates for the sale of the output of Grand Gulf 1, and the UPSA was designated by the Commission as SERI's first rate schedule.[9] Collectively, the rates would generate revenues sufficient to recover the costs of SERI's portion of the output of Grand Gulf 1.

Subsequently, lengthy evidentiary hearings were held in 1983 and 1984 at the Commission in two separate proceedings, one of which was held before Presiding Administrative Law Judge Liebman and the other before Presiding Administrative Law Judge Head. Parties, including the regulatory agencies having jurisdiction over the retail rates of each of the System operating companies and the attorneys general of Arkansas, Louisiana and Mississippi, advocated adoption of various capacity, energy and cost allocation plans in the proceedings. The goal of each of the various proposed allocation plans was to minimize overall power costs to the System operating company located in the jurisdiction of the party proposing the plan. Adoption of any one of those proposals would have correspondingly increased the allocation of costs

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[9] Capacity purchased by each System operating company under the UPSA also affects the payments the companies make and receive for capacity equalization transactions under the System Agreement. Thus each company's entitlement to power from Grand Gulf 1 under the UPSA directly affects the rates for equalization payments under the System Agreement.

to the other System operating companies. One such proposal was made by the petitioners herein (App. at 124a) although it was not the same as the position they now take.

Following the evidentiary hearings, just prior to the commercial operation date of Grand Gulf 1 in July of 1985, the Commission issued its Opinion No. 234, which addressed the findings of facts and conclusions made by each of the two administrative law judges. Overall, the Commission found that the System Agreement and the UPSA, taken together as filed, were unjust, unreasonable and unduly discriminatory. Based upon evidentiary records, the Commission also found that the Middle South Electric System constituted a highly coordinated and integrated electric system in which "planning, constructing and operations" are conducted primarily for "the system as a whole," and "major critical decisions, including decisions to build new generating units," are made "for the benefit of the system as a whole." Opinion No. 234, 31 F.E.R.C. (CCH) at 61,645–46.

The Commission determined that, in order to make the overall power pooling and coordination arrangement of the Middle South Electric System just and reasonable, the entitlement percentages for Grand Gulf 1 established in the UPSA should be revised. The revised percentages were calculated to achieve an approximate equality of each System operating company's responsibility for the combined capacity costs of all four nuclear units within the Middle South Electric System, since the Commission found that each unit was planned and operated for the benefit of the entire System, not just any one System operating company, state or region within the System.

The resulting entitlement percentages for Grand Gulf 1 as ordered by the Commission were 36 percent to AP&L, 33 percent to MP&L, 17 percent to NOPSI, and 14 percent to LP&L. The Commission concluded that the UPSA, as modified by its decision, in conjunction with the System Agreement "will result in just, reasonable, and nondiscriminatory rates for the MSU operating companies." Opinion No. 234, 31 F.E.R.C. (CCH) at 61,656. The entitlement percentages established by the Commission in Opinion No. 234 have been in effect continuously since July of 1985.

In 1987, on petitions for review, the Court of Appeals in *Mississippi Industries* unanimously affirmed the Commission's jurisdiction over the UPSA and the System Agreement, and its authority to modify the allocation percentages for Grand Gulf 1. In so doing, the court stated approvingly:

> Having determined that all MSU generating capacity, including Grand Gulf, had been built and planned on an integrated basis by the MSU system to meet its collective needs and that the allocation of Grand Gulf would affect wholesale rates within the system, the Commission decided that the affiliated operating companies' arrangement for sharing of capacity costs—as set forth in the UPSA and the 1982 System Agreement—was unjust, unreasonable and unduly discriminatory. Under these circumstances, sections 205 and 206 of the [Federal Power Act] plainly provide FERC with authority to modify the Grand Gulf allocation agreed to by the operating companies.

(App. at 79a–80a).

In *Mississippi Industries* the Court of Appeals also initially affirmed the Commission's decision to prescribe a new allocation of Grand Gulf 1 in the UPSA in order to achieve a proportionate allocation of all nuclear investment costs among the System operating companies, but Judge Bork dissented from this aspect of the decision, stating that the Commission had not adequately explained its decision in two respects discussed below. Subsequently, the court *en banc* vacated the portion of the decision from which Judge Bork had dissented and ordered the case reheard, vacated its rehearing order and returned the case to the panel. The panel then granted rehearing and reversed the Commission's decision for the reasons set forth in Judge Bork's dissent, and remanded the case to the Commission for further consideration on the questions raised by Judge Bork.[10]

In the proceedings on remand, which began in 1987, the Commission solicited and received additional comments from the parties as to what action it should take in light of the remand. It received, among others, comments jointly sponsored by the City of New Orleans ("CNO") and the petitioners herein, *i.e.*, the Mississippi Public Service Commission ("MPSC") and the State of Mississippi ("Miss AG").[11] In these com-

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[10] See *Mississippi Power & Light Company v. Mississippi*, 487 U.S. 354, ___ , 108 S. Ct. 2428, 2435 n.8 (1989), for an accurate description of the procedural history of the case prior to the issuance of Opinion No. 292.

[11] Their joint comments were referred to in Opinion Nos. 292 and 292-A as the comments of "CNO, *et al.*" (*e.g.*, App. at 14a).

ments, the petitioners asserted for the first time that "since Grand Gulf is the only nuclear power unit in the MSU system that benefits or contributes to the needs of all four operating companies, a fair [allocation] formula should cover only the costs of Grand Gulf and not include the costs of the other three nuclear units that contribute no benefits to MP&L and NOPSI customers." *Compare* Petition at 7 *with* App. at 16a, 32a–33a. This "formula" is the method that Administrative Law Judge Head had proposed to the Commission in his recommended or initial decision[12] in 1985 (although the petitioners herein did not then support it) and which the Commission subsequently expressly rejected in Opinion Nos. 234 and 234-A in favor of Administrative Law Judge Liebman's method[13]—a formula that included the investment costs of all four nuclear units.

The Commission's decision to reject the method whereby it would only allocate Grand Gulf 1 costs was approved by the court in *Mississippi Industries*, (App. at 107a–109a), and not vacated when the court subsequently remanded the case to the Commission for consideration of its decision in light of Judge Bork's dissenting opinion.[14] Thus, in *City of New Orleans*, on appeal of the Commission's Opinion Nos. 292 and 292-A, the court observed that "the petitioner [CNO, MPSC and Miss AG] . . . offers no alternative for the allocation of nuclear investment costs other than to return to a method that FERC rejected with

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[12] *Middle South Services, Inc.*, 30 F.E.R.C. (CCH) at 65,173.

[13] *Middle South Energy, Inc.*, 26 F.E.R.C. (CCH) at 65,109.

[14] *Mississippi Industries v. Federal Energy Regulatory Comm'n*, 822 F.2d 1104, 1105 (D.C. Cir. 1987).

our approval. *See* 808 F.2d at 1555–56 [App. at 107a–109a]." (App. at 9a–10a). Although the Commission recognized that it was not required to reconsider its earlier rejection of the method whereby it would consider only Grand Gulf 1 costs, the method now supported by petitioners, the Commission addressed every substantive argument advanced by CNO, *et al.* in their comments in support of such method. (App. at 31a–36a).

Specifically, the Commission stated:

> Underlying CNO's arguments is the notion that the only benefit provided by a generating unit is a direct entitlement to capacity from that unit. This premise is false. An important benefit from generating capacity is that demand is met. In addition, in the case of the centrally dispatched MSU System, all companies benefit from the greater diversity in System fuel mix which results from the existence of the nuclear units. Finally, as a result of constructing the System's generating facilities on an integrated basis, the System's members are able to achieve economies of scale in building new generation, reductions in reserve requirements, increased reliability, and efficiencies in operation. 26 FERC at p. 65,098, 30 FERC at p. 65,142, 31 FERC at pp. 61,646–48, *Arkansas Power & Light Co. v. FPC*, 368 F.2d 376 (8th Cir. 1966), *Electric Power & Light Corp.*, 29 SEC 52, *aff'd*, 176 F.2d 687 (2nd Cir. 1949); *Middle South Utilities, Inc.*, 35 SEC 1 (1953). CNO's view as to what constitutes, in this

> case, a "benefit" is too narrow and, accordingly, must be rejected.

(App. at 35a–36a).

Further, in Opinion No. 292-A, the Commission also discussed the repeated claim that ANO 1 and 2 and Waterford 3 did not benefit the customers of MP&L and NOPSI, and found again that *all* nuclear units were originally planned in order to meet System demand as well as to diversify the System's fuel mix and that all nuclear units "are, at present, operated to meet base load demand on the System." (App. at 42a).

In *City of New Orleans*, the court did not reexamine in detail the Commission's reconsideration of the now twice-rejected arguments supporting the method of allocating only Grand Gulf 1 costs, but stated, as already noted, that the method had been rejected previously by the Commission "with our approval." Moreover, the court expressly found that "the Commission has fully and adequately reconsidered, on remand, its decision to equalize the capacity costs of *all* nuclear plants." (App. at 8a (emphasis added)). This finding inherently rejects the petitioners' faulty factual premise that customers of MP&L and NOPSI derive no benefits from the nuclear units owned by LP&L and AP&L. Further, the court cited with approval the Commission's "findings and explanations" that

> a proportionate allocation of nuclear investment costs was justified by the indirect benefits provided by the nuclear units to all the companies. *Id.* at 61,622. For example, be-

> cause of the existence of the Arkansas Nuclear One station, Arkansas Power & Light Company has extra coal-fired generation, which may become available to other companies in the pool. *See System Energy Resources, Inc.*, 42 F.E.R.C. at 61,425. Furthermore, the presence of the nuclear units in the integrated system helps to achieve economies of scale, reductions in reserve requirements, increased reliability and efficiencies in operation. *See System Energy Resources, Inc.*, 41 F.E.R.C. at 61,622–23.

(App. at 9a).

Petitioners' statement of the case contains a discussion (Petition at 10–14) of Judge Bork's dissent (App. at 135a–137a) to *Mississippi Industries* and the Commission's subsequent reconsideration of the two points raised in it. Given the reasons advanced by petitioners for granting the writ, which make no mention of Judge Bork's dissent, this discussion is disproportionately long and largely irrelevant.[15] The Court should not grant the writ on the basis of petitioners' references to Judge Bork's dissent, particularly since it does not provide a basis for their arguments. Although not stated in the Petition, the

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[15] Judge Bork's dissent would be more relevant to the petition's rationale (i) if petitioners sought one of the alternative allocation methods that such dissent suggested the Commission should have considered; or (ii) if, in response to the dissent, the Commission's reexamination of the basic allocation issue had revealed a fallacy in its rejection (with the court's non-vacated approval) of the one specific method of allocation sought by the petitioners—the method of allocating only Grand Gulf 1 costs and disregarding the investment costs of ANO 1 and 2 and Waterford 3.

petitioners never supported either of the alternative allocation methods suggested for consideration by Judge Bork.[16] Indeed, in their December 16, 1988 brief to the court in *City of New Orleans* (at 39–40 nn.33–34), the petitioners (as well as CNO) stated that the first alternative would be discriminatory and that the second would be "very discriminatory."

Second, in Opinion No. 292, the Commission thoroughly analyzed the two points raised by Judge Bork and satisfied both concerns. As to the first point, the Commission met Judge Bork's concern that it had not explained "adequately" its criteria for determining what is "undue discrimination" by presenting an in-depth discussion of its criteria, with citations to supporting precedent. (App. at 19a–24a). As to the second point, the Commission explained carefully and thoroughly why Judge Bork was mistaken in believing that its earlier explanation supporting the chosen allocation method was not rational. (App. at 25a–29a). In *City of New Orleans*, the court unanimously approved these explanations, finding specifically that the Commission "has adequately explained its criteria for determining what constitutes 'undue discrimination' "; and that its "judgment in this case [to allocate the capacity costs of all nuclear units] is not unduly discriminatory." (App. at 8a).

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[16] On remand, the Commission was to consider, rather than equalizing the costs of all nuclear units, equalizing (i) only the capacity costs of Waterford 3 and Grand Gulf 1, or (ii) the costs of all nuclear and coal units.

REASONS FOR DENYING THE WRIT

A. Petitioners, In Reality, Are Challenging A Conclusive Finding Of Fact Fully Supported By The Record Below.

The Commission found, after lengthy and detailed evidentiary hearings, that within the Middle South Electric System there had been a historical pattern of equalized wholesale capacity and energy costs (*i.e.*, production costs) among the System operating companies. The Commission also found that this pattern of equalization, which prevailed under the various System Agreements dating back to the early 1950s, was broken by the escalation of investment costs of nuclear units completed by SERI and LP&L in the 1980s after much less costly nuclear units had been completed already by AP&L. (*See, e.g.*, App. at 70a, 18a–19a). The Commission also found, based upon substantial record evidence, that the Middle South Electric System constituted a highly integrated electric system and that Grand Gulf 1, like every other nuclear generating unit, was built to serve the needs of the System as a whole. (*See, e.g.*, App. 68a–70a). Recognizing the reasonable equality of non-nuclear capacity and energy costs and nuclear energy costs historically borne by each of the System operating companies, the Commission reasonably concluded that it should focus on the one complicating factor—"the disparities in installed nuclear investment [capacity] costs which existed on the MSU System." (App. at 19a).

These findings led logically to the Commission's decision to allocate the capacity and associated costs of Grand Gulf 1 in percentages that would achieve an overall equality of nuclear investment costs among the System operating companies, thereby restoring

the historical pattern of *de facto* production cost equalization among the System operating companies. (The Commission derived the proper allocation percentages for Grand Gulf 1 capacity and costs by using the relative average demand responsibilities of the System operating companies.) Then, in essence, assessing the total effect of its decision, the Commission found that the method of allocating all nuclear costs in proportion to relative demand responsibilities of the System operating companies would achieve an overall allocation of production costs that was (1) just and reasonable and not unduly discriminatory; and (2) not dramatically disruptive of the System's historical operation. (App. at 126a–128a).

Petitioners contend that in *City of New Orleans* the Court of Appeals gave "total deference" to the Commission and "abdicated its limited but essential review function under the Federal Power Act." Petition at 15–16. Moreover, they attempt to frame a series of "important questions" that allegedly were not answered by either the court or the Commission. *Id.*[17]

These arguments are meritless and are based primarily on a total disregard of the court's extensive and non-vacated review of the Commission's decisions in *Mississippi Industries* and of the limited purpose of the court's remand of the case to the Commission. In *Mississippi Industries*, the court carefully and

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[17] These "questions" include: Does the alleged subsidization of AP&L and LP&L's customers by those of NOPSI and MP&L not constitute "undue discrimination"? What is the proper standard of judicial review? Does a system-wide allocation justify intra-system discrimination? and, Where is the inquiry into the "total effect" of the order? None of these questions, however, lacks for a ready answer.

thoroughly examined every aspect of the fact finding, analysis and rationale underlying the Commission's decision in Opinion Nos. 234 and 234-A to allocate all nuclear capacity costs. (App. at 48a–73a, 102a–116a, 124a–130a). The court's purpose in remanding the case was to obtain further explanation from the Commission of the criteria it had employed and reconsideration of the decision. It did not suggest, imply or direct the Commission to take additional evidence, or abandon its prior decision, nor did the court express any dissatisfaction with any of the underlying findings of fact that the Commission had made on the basis of the evidentiary record.

Upon remand, the Commission did not change its decision but instead explained why it produced a just, reasonable and non-discriminatory result. Accordingly, in *City of New Orleans*, the Court of Appeals did not need to repeat the thorough review contained in *Mississippi Industries* in order to meet its duty of judicial review. It needed only to determine that the Commission, upon remand, had adequately addressed and rationally answered the two specific questions raised by the dissent to *Mississippi Industries* and that the Commission's reconsideration of these points had not uncovered a flaw in its decision to allocate all nuclear capacity costs.[18] The court's opinion was

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[18] Moreover, as this Court has twice held in landmark decisions, if the total effect of the Commission's rate orders cannot be said to be unjust and unreasonable, judicial inquiry is at an end. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968). *Cf. Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 278 (1976) ("[T]his Court has held, however, [that] there is no single cost-recovering rate, but a zone of reasona-

succinct but clearly made the necessary determinations.[19]

In reality, petitioners' assertion that the Court of Appeals did not fulfill its duty of proper judicial review and thus left important questions unanswered seeks to hide their essential quarrel. Petitioners refuse to accept the Commission's factual determination that every nuclear unit within the System benefits the customers of NOPSI and MP&L as well as the customers of AP&L and LP&L, irrespective of which company owns (or leases) the unit and where it is located. Again and again, petitioners assert as if it were a matter of common knowledge, but *without record citation* or any other support, that Waterford 3 and ANO 1 and 2 only benefit local ratepayers in Louisiana (except those in New Orleans) and Arkansas, respectively, and not ratepayers in New Orleans

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bleness: Statutory reasonableness is an abstract quality, represented by an area rather than a pinpoint.")

[19] As the court stated:

> On the record . . . we find . . . first, the Commission has fully and adequately reconsidered, on remand, its decision to equalize the capacity costs of all nuclear plants; second, FERC has adequately explained its criteria for determining what constitutes "undue discrimination"; and, third, the Commission's judgment in this case is not unduly discriminatory.

(App. at 8a). The court added further that:

> Indeed, the petitioner, while opposing the Commission's current judgment, offers no alternative for the allocation of nuclear investment costs other than to return to a method that FERC rejected with our approval. *See* 808 F.2d at 1555–56.

(App. at 9a–10a).

and Mississippi. *See, e.g.*, Petition at 6 n.3, 7, 8, 9, 13, 15, 17. These assertions are, in reality, nothing more than unsupported opinion.

If petitioners' contentions were correct, but such fact had somehow been overlooked by the Commission and the court, then questions would be raised. The Commission correctly found, however, after an extensive and focused evidentiary hearing, that customers in New Orleans and Mississippi do benefit from the existence and operation of the System's nuclear capacity located in Louisiana and Arkansas; and the court affirmed these factual findings in *Mississippi Industries* and in *City of New Orleans*. *See* App. at 107a–108a (Commission's finding that all Middle South Electric System nuclear units have been planned to meet overall System needs and objectives "is more than adequately supported by the record"); App. at 68a–69a ("[A]t least five witnesses testified that new units were added to address the needs of the System as a whole"); App. at 9a ("[T]he Commission also found that a proportionate allocation of nuclear investment costs was justified by the indirect benefits provided by the nuclear units to all the companies. . . . Furthermore, the presence of the nuclear units in the integrated system helps to achieve economies of scale, reductions in reserve requirements, increased reliability and efficiencies in operation").[20]

Not even Judge Bork's dissent challenged the validity of the finding that ratepayers throughout the

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[20] Moreover, there is nothing "vague" (Petition at 13) about these benefits. See *Gainesville Utilities Dep't v. Florida Power Corp.*, 402 U.S. 515, 517–21 (1971), for this Court's discussion of some of the significant benefits of power pools or interconnection agreements among electric utility companies.

System receive benefits from all four nuclear units and not just from Grand Gulf 1. Judge Bork, in fact, stated that "a basic, and necessary, premise of the Commission's jurisdiction in this case, as well as the validity of the decision, is that the companies are not autonomous and that decisions are made for the System as a whole." (App. 136a).

Clearly, the court determined that the Commission's essential findings of fact, including the one disputed repeatedly by petitioners, were supported by "substantial evidence." Thus, despite petitioners' refusal to acknowledge that all nuclear units in the Middle South Electric System, without regard to ownership or location, confer benefits on all customers served by the System operating companies, that fact is "conclusive." *See* § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).[21]

In short, neither the court nor the Commission is guilty of a "failure . . . even to address" (*e.g.*, Petition at 15) the alleged problem of allocating the costs of generating units to ratepayers who derive no benefit from them. They addressed the alleged problem and found on the basis of the record, developed at length by the petitioners and other parties to the proceedings, that it does not exist.[22]

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[21] Indeed, in a recent pleading before the Commission in an unrelated case involving a new filing by one of the System operating companies, the State of Mississippi asserts that the "capacity mix of coal and nuclear of the Entergy System" produces "benefits for the ratepayers on the entire [S]ystem under the [S]ystem [A]greement." (Motion for Intervention By the Attorney General of the State of Mississippi, FERC Docket No. ER90-38-000, November 13, 1989, at 2.)

[22] This is not a case in which affirmance of the Commission's

B. There Is No Absence Of Controlling Precedent With Regard To The Issue Resolved In This Case; And The Commission May Not Establish An Allocation Method That Causes Ratepayers In One State To Subsidize Those Of Another.

Petitioners contend also that (1) the decisions below were rendered without adequate prior guidance from the Court on the "content" of the Federal Power Act's "non-discrimination standard" and (2) potential parties to future cases are left without "definitive articulation of what is and what is not a discriminatory rate structure" in the context of an alleged "interstate-intrastate discrimination." (Petition at 18). Further, they contend that the Commission is left "free" to establish a rate structure in a future similar case (if there ever is one) that causes ratepayers in one state to subsidize those of another.

These arguments are wrong. First, they ignore the importance of broad but important guidelines in precedent such as: (1) *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (Commission not "bound to the use of any single formula or combination of formulae in determining rates" since "it is the result reached not the method employed which is controlling"); (2) *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945)

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decision must depend on the "presumption of validity" that "attaches to each exercise of the Commission's expertise," *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968), since the ultimate effect of the Commission's order is just and reasonable by a wide margin; and the court did not reveal the slightest preference for some other result. Nevertheless, it bears noting that those who would overturn the Commission's judgment undertake a heavy burden to show that it is unjust and unreasonable in its consequences. *Id.*

(the "[a]llocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science"); and, indeed (3) Justice Scalia's reminder, cited favorably by petitioners, that the Commission has the "responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one State subsidize those of another." *Mississippi Power & Light Company v. Mississippi*, 487 U.S. 354, 108 S. Ct. 2428, 2445 (1988).

Second, petitioners' arguments disregard the more specific standards, applied by the Commission and approved by the court in *Mississippi Industries* and *City of New Orleans*, to resolve this particular case:

> The MSU System is an integrated system organized pursuant to the provisions of the [PUHCA]. Generation facilities are planned, constructed, and operated primarily for the benefit of the System as a whole. . . . Application of the [Federal Power Act's] prohibition against undue discrimination to the circumstances of this case requires that total production costs, which include both capacity-related and energy-related costs, on the entire System be allocated fairly among the members of the MSU Pool.

(App. at 18a). Moreover,

> Generating capacity is built in order to meet demand. Therefore, the cost of capacity should be allocated throughout an electric utility system in proportion to demand.

(App. at 8a, 20a.)

Thus, there is no absence of precedent with regard to the Commission's duty to ensure that the allocation of the benefits and costs of nuclear power plants within a highly integrated interstate electric utility system is just, reasonable and non-discriminatory. The Commission could not and would not approve in another case, as it has not in this case, an allocation of costs that the record showed would produce an unduly discriminatory allocation within an integrated electric system.

Petitioners also fail to recognize that the Commission's four opinions and the court's two opinions were not intended to set forth a specific method applicable to every conceivable issue, irrespective of factual differences, involving the allocation of production costs within an integrated holding company system or power pool. Instead, the Commission, consistent with its statutory obligation as described in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. at 602, derived a pragmatic, reasonable and logical solution to a specific fact situation presenting "extremely difficult and controversial cost allocation issues which have no easy answers." Opinion No. 234, 31 F.E.R.C. (CCH) at 61,632 (1985).

Finally, contrary to the petitioners' assertion, there is no "strong national interest in truly equalizing the costs of nuclear power among investors and consumers" (Petition at 19), and certainly the central and overriding issue in this case was not cast in terms of equalizing costs between investors and consumers. Nor, contrary to the Petition, is there any "national trend toward placing nuclear power generators under the control of separate [regional] production subsidiaries . . . rather than under local or system operating

utilities" (*id.*); and the article cited by petitioners (*id.* n.7) does not represent that there is.[23] Although the Commission's decisions in this case concerning "who must pay for Grand Gulf 1" (*New Orleans Public Service v. New Orleans*, ___ U.S. ___, 109 S. Ct. 2506, 2509 (1989)), have had a substantial impact in the states of Mississippi, Arkansas and Louisiana (including New Orleans), petitioners fail to establish that any similar controversy, affecting other states, is waiting to erupt when this controversy is finally resolved. While the use of nuclear power plants is widespread and while there are several other integrated holding company systems under PUHCA, the facts and background of the central controversy in this case are specific and unique to the history of the Middle South Electric System and are not likely to be repeated.

The petition for a writ of certiorari does not identify any "national pace-setting nuclear cost allocation problems emerging from the interstate MSU system" that need resolution in this Court. The petition only demonstrates the need for the Court to put an end to further litigation concerning the Commission's conclusive findings of fact and well reasoned decisions in Opinion Nos. 234, 234-A, 292 and 292-A, as af-

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[23] The authors of the article discuss the need for reviving the "nuclear power option," the difficulties confronting the successful and economic construction of nuclear units, and offer an opinion that what "appears to be required" is the formation of large, regional "nuclear generating companies" similar, apparently, to Electricité de France, the large French utility. No trend toward the development of such companies in the U.S. electric power industry is noted, and even if there were one, the potential cost allocation issues their formation might engender would be different from those involved in this case.

firmed in *Mississippi Industries* and *City of New Orleans.*

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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